No. 624

In the Supreme Court of the United States

October Term, 1968

Clyde A. Perkins, *Petitioner*

v.

Standard Oil Company of California

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Respondent

Francis R. Kirkham
Richard J. MacLaury
225 Bush Street
San Francisco,
California 94104

Of Counsel:

H. Helmut Loring
274 Willamette Avenue
Berkeley, California 94708

Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94104

McColloch, Dezendorf & Spears
800 Pacific Building
Portland, Oregon 97204

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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OPINIONS BELOW

The opinion of the court of appeals (A. 104-117) is reported at 396 F.2d 809. The court of appeals' opinion denying a petition for rehearing (A. 103-104) is reported at 396 F.2d 809, 817. The court of appeals' opinion in response to petitioner's motion for clarification (A. 102) is incorporated in the principal reported opinion. Judge William G. East, the trial judge, rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1967 (A. 7). The petition for rehearing was denied on July 11, 1968 (A. 103).[1] The petition for a writ of certiorari was filed on October 9, 1968, and was granted on January 13, 1969 (393 U.S. 1013). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The principal question presented is:

1. Whether the Robinson-Patman amendments to Section 2(a) of the Clayton Act apply to fourth-line competition.

Subsidiary questions are:

2. Whether (a) petitioner may urge the original provisions of Section 2(a) of the Clayton Act in an effort to support the judgment below, in view of the fact that this issue was not raised or passed upon in the court of appeals, and, (b) if the issue be considered, whether this record shows a violation of such provisions.

3. Whether the court of appeals was correct in its ruling that the trial court erred on certain damage issues and, if so, whether these errors, and other numerous errors by the trial court, require that there be a new trial.

STATUTES INVOLVED

The relevant statutes are set out at pp. 3-4 of petitioner's brief, except for section 2(b) of the Clayton Act, as amended

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1. A docket entry in the court below (A. 7) purports to reflect the filing of an order denying the petition for rehearing on July 9, 1968, from which date the petition would be out of time. However, the parties were served only with the July 11 opinion, and we are informed that the July 9 entry is erroneous.

by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(b) which provides:

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

STATEMENT

1. Introduction.

This is an action brought by petitioner against Standard Oil Company of California (Standard) for treble damages for alleged violations of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act.

The case was tried in the District of Oregon before District Judge William G. East and a jury. After an extended trial in which there was compiled a record of some 6,400 pages of transcript and more than 15,000 pages of exhibits, the jury returned a verdict of $336,404.57 for petitioner. Judgment for treble that amount was entered which, with judgment for $289,000 in attorneys' fees for petitioner, made the total judgment against Standard $1,298,213.71. Standard appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the judgment of the district court and directed a new trial.

2. Petitioner's brief.

A proper consideration of the issues in this case requires, at the outset, a correction of the misstatements of the record in petitioner's presentation. Petitioner's brief presents the case of a narrow and technical ruling by the court of appeals on a record reflecting widespread predatory price discriminations by Standard in favor of its dealers and its customer Signal Oil and Gas Company (Signal), which depressed prices to ruinous levels and which destroyed petitioner's business. This is untrue, and the record references given in petitioner's brief in an effort to make this story credible do not support his statements. We refer, at the outset, to a number of material misstatements which are discussed more fully later in this brief.

Petitioner states that in Portland in mid-1956 Regal stations cut prices; that, within a few days after the first Regal station opened, the retail price in Portland had dropped 4 cents per gallon; and that this precipitated a price decline throughout the Pacific Northwest (Br. 16-17[2]). Petitioner further states that all of this was due to "the price and price-related discriminations which Signal received from Standard and passed on to its subsidiary, Western Hyway, and then to Regal, Western Hyway's subsidiary" (Br. 17).

Not one of the record references cited by petitioner supports the statement that a price discrimination by Standard precipitated a price war or caused any injury to petitioner.

2. As used herein, "A," refers to the Appendix to petitioner's and respondent's briefs: "Pet." to the petition for writ of certiorari: "R." to the clerk's transcript of record in the court of appeals: "Tr." to the trial transcript: "Br." to petitioner's brief; and "Exh." to exhibits. Exhibits Nos. 1 through 429 were offered by petitioner and Exhibits 1,000 and upward by respondent.

On the contrary, the record shows that at the time the first Regal station opened, and for more than two months thereafter, Standard's price to Perkins was *lower* than its price to Signal (p. 21, *infra*). At no time thereafter did Signal ever have a favorable price differential over Perkins of more than 45 one-hundredths of a cent (except for two days at 68 one-hundredths of a cent) (*ibid.*). There is no evidence that even these small differentials were ever "passed on to Western Hyway, and then to Regal." Indeed, the only evidence is to the contrary (*infra*, p. 22, and note 23; p. 27, and note 25).

Petitioner states that the important question "whether Signal passed on to Regal its price advantages" was "properly submitted to the jury and resolved in favor of petitioner" (Br. 54). The fact is that this question was not submitted to or passed upon by the jury. Indeed, the court refused to give respondent's instructions which would have submitted to the jury "the passing on" issue (A. 96-97; A. 458).

Petitioner states that there was substantial evidence that Standard "discriminated in price in favor of its Branded Dealers and against Perkins" (Br. 13); that "Branded Dealers, who were retailers, often purchased gasoline from Standard at lower net prices than Perkins" (Br. 15); that "[a]ll aspects of petitioner's business were drastically affected" by Standard's price discrimination in favor of "its Branded Dealers in the Pacific Northwest" (Br. 20); and that "Standard's price discrimination" in favor of its branded dealers "occasioned many persons to cease purchasing gasoline from customers of Perkins" (Br. 21).

Not one of the record references cited by petitioner supports these statements.

The fact is that during the entire claim period of almost

three years not one of Standard's numerous dealers in the 33 localities where Perkins sold gasoline ever paid a lower price for gasoline than Perkins, except for one inconsequential incident.[3] There is no evidence in the record that a single person ever ceased purchasing gasoline from Perkins or customers of Perkins on account of Standard's prices to its dealers (*infra*, p. 14, note 12; p. 48).

Petitioner states that in Centralia "Signal had passed the benefits of Standard's price discriminations" to "retail stations" (Br. 14), and that this initiated a severe price war. Not one of the record references cited by petitioner supports this statement. There is no evidence that Signal, or a customer of Signal, ever sold to a retail station in Centralia or precipitated a price war there (p. 19, and notes 19, 21, *infra*).

Petitioner states that "retailers purchasing Standard gasoline through Signal" had received from Standard "numerous other benefits" (Br. 13) and "price-related discriminations" (Br. 13, 17) not made available to Perkins. Petitioner does not advise this Court that the trial court specifically withdrew from the jury all questions concerning Signal except the single issue of price discrimination (A. 47; see p. 13, note 13, *infra*).

Petitioner states that Regal "advertised that they accepted major oil company credit cards and touted their gasoline as a 'Major Brand'" (Br. 16) and complains that Standard prohibited Perkins from indicating that his product came from a major oil company (Br. 18). The trial court, referring to the advertisement by Regal that it sold major brand gasolines and would accept all major credit

3. During a local price war in the town of Centralia, Washington—long before Regal ever entered the market—five dealers in one price zone in the town had a price advantage on one grade of gasoline of one cent per gallon for a period of one week (p. 13, *infra*).

cards, instructed the jury to disregard such testimony "because it is not relevant to any issue before you in this case" (A. 70).

Hereinafter we correct other misstatements in petitioner's brief.

3. The facts.

A. STANDARD

Standard is an integrated oil company in that it produces and refines crude oil and markets refined products. Its principal market is on the West Coast, which includes the areas in which Perkins operated in Oregon and Washington. In these areas Standard sold its gasoline to Signal, to rebrand jobbers including Perkins, to independent retail dealers using Standard's brands[4] and to the motoring public through its company-operated retail stations.

B. SIGNAL

Signal, like Standard, was an integrated oil company (Br. 8). It produced crude oil, operated a refinery and marketed gasoline throughout the Western states (A. 411-412). By 1931, Signal's gasoline market had grown to about two million gallons of gasoline a month, which was the maximum its refinery could produce (A. 412). However, it had an excess of crude oil, and in 1932, to obtain additional gasoline, it entered into agreements with Standard under which it supplied crude oil to Standard and, at the same time, purchased its gasoline requirements (Tr. 5443-5445).

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4. Standard's brand names were Chevron and Signal. Standard's Signal dealers had no connection with Signal Oil and Gas Company. Signal Oil and Gas Company was wholly independent from Standard. The brand name "Signal" as applied to petroleum products was acquired by Standard from Signal Oil and Gas Company along with certain retail facilities in 1947 (A. 417-419). "Signal" in this brief always refers to Signal Oil and Gas Company.

These agreements were renewed in 1937 (A. 413) and again in 1947, at which time Standard agreed to supply Signal's gasoline requirements throughout the states of California, Oregon, Washington, Arizona, Nevada, and Idaho (Exh. 1007).

The arrangement was, in effect, a crude oil processing arrangement under which Standard took Signal's crude oil and returned to Signal a portion of the gasoline contained therein (A. 417-418). As Signal's deliveries of crude oil increased, Standard was obligated to return increased quantities of gasoline (A. 418; Exh. 1007).[5] The contract term was for six years and, thereafter, it became terminable by either party upon six months' notice given after July 1, 1953 (Exh. 1007).

In March 1955, Signal sent notice to Standard that it could purchase from 12 to 18 million gallons per month from a major competitor at discounts off posted price of 5 cents for regular and 6 cents for ethyl (A. 428). Its discounts from Standard were 4.5 cents on regular and 5.5 cents on ethyl. In December, 1955, Standard submitted to Signal a proposed new contract, but Signal refused to accept because it had received lower price offers from other major suppliers (A. 425-426). In March, 1956, Signal advised Standard that suppliers of major company products were offering gasoline at points as far north as Eugene, Oregon, for prices lower than those charged Signal by Standard (Exh. 1705; A. 426-427), and requested an adjustment to meet these competitive prices (A. 428; Exh. 1705, A. 651).

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5. To determine the quantity of gasoline Standard was obligated to deliver to Signal, the gasoline content of the crude oil was deemed to be approximately 30 per cent (A. 418; Exh. 1007). By 1945 Signal was supplying Standard with 40,000 barrels of crude oil per day (A. 413-414).

In the summer of 1956, Standard learned that Union Oil Company of California was negotiating to get the Signal business by undercutting Standard's prices (A. 429-430) and, in fact, Union already had commenced gasoline deliveries to Signal in Arizona (Exh. 1703, A. 649). Shortly thereafter, Western Hyway Company, a customer of Signal, received offers from other suppliers at prices lower than those charged by Signal (A. 430-431), and Signal decided to buy gasoline from competitors of Standard where available at a lower price (A. 430). Eventually, to retain this business, Standard in January, 1957, lowered its gasoline prices to Signal in an amount less than Signal was demanding. The new formula provided for a reduction in contract prices not to exceed three quarters of a cent per gallon (A. 433-436; Tr. 5497-5501, 5503-5504). The arrangement applied equally throughout the states of Washington, Oregon, California, Arizona, Nevada and Idaho in which Standard was then obligated to furnish Signal with gasoline (A. 433, 435).[6] This overall adjustment, required by the lower prices of competitors, had no predatory element as to any customer, and, particularly, none as to any customer in Washington and Oregon. Until this time, Standard for almost a year had sold gasoline to Perkins in the Northwest at a lower price than Signal paid under its six-state contract (Exhs. 1448, 1007). After the price adjustment to Signal, its prices were lower than Standard's

6. At the time of the adjustment in January 1957, a sum was agreed upon and paid by Standard to Signal upon the basis of $.0052 per gallon of gasoline sold to Signal in the six-state area during the period March 1 through June 30, 1956, and on the basis of $.0065 per gallon from July 1 through December 31, 1956 (A. 424-425, 433; Exhs. 23H, A. 504, 1550B, A. 631, 1550B-1, A. 632). Signal had no knowledge in 1956 that such a payment would be made in 1957 (A. 433); nor did it pass this payment on to its customer Western Hyway (Exhs. 1458A, 1550, p. 21, n. 22, *infra*).

prices to Perkins by amounts varying from 36 one-hundredths to 45 one-hundredths of a cent, except for two days when the differential was 68 one-hundredths of a cent (Exh. 1550, *infra*, p. 21, note 22).[7]

Throughout 1957, Standard continued its attempts to negotiate a firm contract with Signal (A. 436). But in that year, Signal purchased millions of gallons from Union Oil Company, and Standard offered documentary evidence, which the trial court rejected, showing that Union's prices were lower than Standard's prices to Signal.[8]

By the end of 1957, because of lower prices offered by competitors, gasoline sales by Standard to Signal had dwindled to about a third of what they had been earlier in the year (Tr. 5531-5532, 5536; Exh. 1710, A. 656). Standard decided to terminate its agreement with Signal (A. 439-440), and, about the same time, Perkins terminated his contract with Standard and entered into an agreement to lease his stations to ~~purchase gasoline from~~ Westway, a subsidiary of Union.

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7. Petitioner criticizes respondent for minimizing the price discrimination in favor of Signal of "more than $1 million, a substantial portion of which was directly allocable to Signal's purchases in the Pacific Northwest" (Br. 54). The "substantial portion" allocable to Signal's sales in Portland—the only sales involved—was 3.8% (A. 449). Moreover, even a figure of $38,000 overstates the total *differential* for the year and a half involved. The $1 million figure represents the total difference between Standard's old and new prices on all of the products it sold to Signal during that period in the entire six-state area. The *differential* between Perkins' price and Signal's price was less, per gallon, than the price change, per gallon, because Perkins enjoyed a price advantage over Signal before the price change (p. 9, *supra;* p. 21, *infra*).

8. The district court rejected Exhibits 1694-1702 (A. 638-648), 1708 (A. 654), 1713 (A. 658) and 1714 (A. 660), which were Union's business records showing sales by Union to Signal at prices below those offered by Standard (Tr. 5201, 5539-5541). The documents were offered to corroborate the prior notice by Signal to Standard of lower competitive offers and as direct evidence of Union's prices. The court of appeals held that the district court's rejection of these exhibits was error (see A. 116-117).

C. WESTERN HYWAY COMPANY

Western Hyway was not a "trucking company" as petitioner states (Br. 9), but a wholesale distributor of petroleum products which it sold to retailers, sub-distributors and jobbers (A. 395). Western maintained a marine terminal on the Sacramento River from which it distributed products in central California, western Nevada and southern Oregon (A. 392).

Signal sold Standard gasoline to Western in Portland, Oregon, where Western was Signal's only customer (Tr. 544, 545). The gasoline was picked up at Standard's Willbridge plant and was sold to three Regal stations in Portland (A. 395). Western's only customers relevant to this case were these three Regal stations.[9]

Sixty per cent of Western's stock was owned by Signal and forty per cent by corporate officers of Western (A. 393). There was no evidence of common directors or officers between the two companies or that Signal exerted any operational control over Western. Commencing in 1955, Western purchased gasoline from suppliers other than Signal. By 1957, these purchases, which deprived Signal of its "wholesale profit" (Exh. 1711, A. 657), amounted to more than 50 per cent of Western's total volume (A. 210-211; Exh. 1458D).

D. REGAL STATIONS CO.

Regal Stations Co. (Regal) was organized as an Oregon corporation in 1956; Western owned a fifty-five per cent stock interest in Regal; the remaining forty-five per cent was owned by five individuals who had no relationship

9. Western Hyway also made some sales of this gasoline to a Fortune station in Salem (A. 393-394). Since the Perkins corporations did not market in Salem, the trial court excluded claims based on Fortune stations (A. 69-70).

with Western (A. 393). Regal operated three service stations in Portland (*ibid.*).[10] The first Regal station opened in Portland in September 1956 (Exh. 1683), the second in December of that year and the third in January 1957 (Tr. 528).

Regal introduced marketing methods which were entirely new in Portland and the Northwest. It opened large, clean, well-advertised multiple-pump stations situated on corner sites with maximum access to the motoring public (Exhs. 106C, A. 559, 106D, 106E); it adopted large supermarket techniques (A. 223, 230, 244, 258, 276-277, 287; Tr. 790, 1240-1241, 2209-2210); used "many, many pumps" (Tr. 790; sold kitchen utensils and other merchandise (Tr. 1240-1241); gave premium stamps and raffle tickets (A. 226-227, 265, 276; Tr. 790); emphasized volume sale of gasoline rather than other products and services normally offered by a retail station (Tr. 1241); and charged low prices (A. 229). In short, Regal did "an excellent job" of advertising, promotion and merchandising (A. 223; Tr. 980). Perkins said "it was entirely new from anything we had ever seen before" (Tr. 1241). Perkins' nephew, a distributor in Vancouver, said Regal was a new "much more glamorous type of operation" (Tr. 790).

E. STANDARD'S BRANDED DEALERS

Standard's branded dealers were independent operators of retail stations who marketed Standard's gasoline and petroleum products under Standard's brand names. Standard normally supplied its dealers at Standard's posted

10. From time to time, there had been a number of companies which used the brand name "Regal" (see, *e.g.*, A. 205-209). At the time of trial there were only three (A. 209). This case concerns only one—Regal Stations Co.—which operated three stations in Portland and which was the only company which used the Regal brand in the Northwest (A. 209; Tr. 4776, 4778).

tank truck prices (A. 197; Exhs. 24BBB, 24CCC, 1511A, 1511B). The dealers established their own retail prices (Tr. 480, 4913, 4918, 4938). Prices at so-called "minor" or "independent" service stations, such as Perkins' "Champion" stations, were usually about two cents per gallon below the retail price for major brands (A. 223, 227, 204, 264; Tr. 792). Standard's price to Perkins, as a jobber who in turn sold to dealers, was normally 4 to 5½ cents less than its price to its own branded dealers (A. 588-604; Exh. 1448).

It was Standard's policy to grant price assistance to its dealers in a given locality when retail prices at competitive *major* brand stations declined during price wars (Tr. 4915-4917, 4937, 4941-4942; Exhs. 1453A, 1453B). Standard's retail price assistance to its dealers was a temporary day-to-day price reduction. During the claim period (March, 1955-November, 1957), such assistance was given at one time or another in only seven of the 33 localities in which Perkins had customers. (Exhs. 81A-81XX, summarized in Exhs. 1523A-1523CC, A. 622, 623).[11] With one immaterial exception, Perkins always had a price advantage over Standard's dealers (Exhs. 1456A, 1457A, 1463, 1467, 1477-1483, 1485, 1488-1491, 1493-1495, 1497, and 1500, which are depicted in graphs at A. 588-604). The exception occurred during a price war in the town of Centralia, Washington, when five of Standard's dealers, for one week only, paid one cent less on regular (but not on premium) gasoline than the

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11. Centralia, Washington (1523L-M; A. 616-617; 1523X-CC, A. 625-630); Portland (1523A-C, A. 605-607), Albany (1523D-F, A. 608-610), Grants Pass (1523K, A. 615; 1523S-T, A. 622-623), Roseburg (1523H-I, A. 612-613; 1523P-R, A. 619-621), The Dalles (1523W, A. 624) and Winston (1523J, A. 614), Oregon. The price to Perkins compared with the tank truck price less price assistance ("subsidy") to Standard's dealers in these and other localities are shown on graphs (A. 588-504)

price paid by Perkins (Exhs. 1448, p. 10, 1497, 1450W, 1450Y, 1523X-1523Y, 1523BB, A. 625-629).[12] There is no evidence that Perkins or any of his customers lost any sales to Standard's dealers in Centralia during this week.

Standard's branded dealers made sales on Standard's credit cards and could earn an allowance of one-quarter cent per gallon for maintaining clean restrooms.[13]

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12. Petitioner misstates the record when he asserts that "there was substantial evidence from which the jury could have found that Standard also discriminated in price in favor of its Branded Dealers and against Perkins" (Br. 13). Of the 12 record references cited in support of this assertion one is the statement in the opinion below which merely recites petitioner's contention (A. 106-107); one (A. 247) refers to the testimony of a dealer in Roseburg who recalled that sometime during a price war between May 1956 and January 1957, he received 7 cents per gallon price assistance, but admitted he could be wrong when, shown that Standard's records for his station showed a price assistance of 7/10 of a cent, rather than 7 cents, on July 15, 1957 (Tr. 640-641; Exhs. 811, 1453-R); the remainder of the exhibit and transcript citations refer to the fact that Standard generally extended price assistance to its branded dealers in localities where there were price wars. In not one of these record references is there any evidence that the net price to dealers was less than the price to Perkins, except for the immaterial incident referred to in the text.

Petitioner also misstates the record when he says that price discriminations in favor of Standard's dealers "occasioned many persons to cease purchasing gasoline from customers of Perkins" (Br. 21). There is no evidence that any Standard dealer ever diverted trade from Perkins or any of his customers. Two of the record references (A. 239, 240; Tr. 588) cited in petitioner's brief (p. 21) concern a loss of trade by a Champion dealer to a Shell dealer who at unspecified times bought unspecified quantities at unspecified prices from a Standard commission agent (A. 241). The remainder likewise make no mention of a Standard dealer but refer to patronage of a Regal station and to purchases by a Perkins distributor from Pennco, a company having no connection with Standard.

13. Petitioner states that there was "substantial uncontroverted evidence" that "the Branded Dealers and other retailers purchasing . . . through Signal had received from Standard numerous other benefits (such as advertising allowances) which had not been made

F. PERKINS

In 1945, Perkins, together with Robert Harris and Lee Powell, entered into a petroleum products supply contract with Standard. This agreement was superseded by a new one in April 1953 (Exh. 2, A. 493) and this, in turn, by another in July 1956 (Exh. 102, A. 549).

In 1952, Perkins transferred his business to two corporations (Tr. 166, 169; Exhs. 403, 422, 423, 425, 428). These were Perkins Oil Company of Oregon and Perkins Oil Company of Washington.[14] While Perkins personally retained ownership of his service stations and bulk plants, he leased them to the corporations at flat monthly rentals except for

available to Perkins' retail stations or the retail stations supplied by him" (Br. 13).

The statement is not correct. There is no evidence that Signal sold to any retailer. The record references cited (Br. 13) do not support the assertion. Exhibit 2 (A. 493) is Perkins' contract with Standard. Exhibit 106 (see A. 559) is a group of photographs of the Regal stations. Each of the transcript references merely refers to retail price assistance to Standard's branded dealers.

The trial court, referring to the advertisement by Regal that it sold major brand gasolines and would accept all major credit cards, instructed the jury that there is no evidence in the record from which it could find that Standard approved of such advertisements, had any direct dealings with Regal or had anything to do with the method of advertising used by Regal (A. 70). It instructed the jury to disregard such testimony "because it is not relevant to any issue before you in this case" and "has no bearing on any issue before you * * *" (A. 70).

The reference to "Perkins' retail stations" is erroneous. Perkins operated only one station (A. 487; Tr. 1241-1242).

There is no evidence in this whole record of any service or facility, other than the restroom allowance and credit card service, which Standard extended to any of its dealers except for the testimony of one dealer who did not operate in any area where Perkins had a customer. He testified that Standard once painted his station and that on one occasion he received an advertising allowance of one tenth of a cent per gallon up to 50 per cent of his actual advertising bill (A. 219). He did not say whether or not Standard owned the station or held the prime lease on it.

14. Throughout this brief, unless otherwise stated, "Perkins" refers to Clyde A. Perkins and the two Perkins' companies.

one or two which were leased to dealers (Exhs. 424, 426, 427; A. 133-134, 155-156, 157, 168; Tr. 1315, 1382-1383). The corporations, in turn, sublet the stations to operators, except for the one station in Vancouver, Washington (A. 487; Tr. 1241-1242).

In 1953, Perkins on the one hand, and Harris and Powell on the other, divided the marketing territory between them (Exhs. 4A, 4B; A. 163-165). The territory assigned to Perkins was roughly southwestern Washington and portions of western Oregon (Exh. 1449, A. 587). Portland and the county in which it is situated (Multnomah) were taken by Powell and Harris.

Within his territory Perkins operated as a jobber, which he defined as "one that buys merchandise from another company and resells it under his own brand to distributors or to service stations or to commercial accounts" (A. 128). Standard had four other jobbers (exclusive of Signal) in the Northwest, three of which were substantially larger than Perkins.[15] Perkins and other jobbers supplied by Standard had their own brand names (Perkins' was "Champion"), their own facilities, their own plants, their own means of distribution, and had developed their own relationship with their retail and other outlets (Tr. 996-997). As jobbers performing these functions, the price to them was from 4 to 5½ cents lower than that normally paid by Standard's branded dealers (*e.g.*, Exhs. 23-H, A. 504, 1448). Perkins operated one retail station in Vancouver, Washington (A. 487; Tr. 242). Standard did not extend the ¼ cent restroom allowance or credit card service given to

15. Washington Cooperative Farmers Association, Trues Oil Company, Truax Oil Company and Clipper Oil Company (Exh. 23-H, A. 504). Perkins claimed price discriminations in favor of these jobbers, but the court withdrew the claims from the jury for lack of evidence (A. 46).

its own dealers to Perkins for this station. However, Perkins bought his gasoline for this station at the jobber's discount of 4 to 5½ cents.[16] In addition, Standard occasionally gave Perkins and other jobbers special allowances or "subsidies" because of competitive market situations (e.g., Exhs. 1311A-1311E, 1414-1416, 1448).

While Perkins' sales declined during the years 1955 through 1957 (Br. 20) other jobbers purchasing at comparable prices from Standard in the Northwest increased their sales: Trues Oil Company (Exh. 23-H, p. 22) Washington Cooperative Farmers Association (Exh. 23-H, p. 24) and Powell and Robert Harris (Exh. 23-H, p. 10, A. 518). The latter two were supplied by Standard under the same contract as was petitioner (Exh. 23-H, A, 504).[17]

16. At page 7 of his brief, petitioner refers to "approximately 60 retail stations . . . leased or operated by petitioner," and, at page 11, says that Standard's branded dealers "competed with petitioner's retail stations and the retail stations supplied by him." The implication that petitioner operated extensively at the retail level is inaccurate. None of the record references cited show that petitioner operated any station other than the one at Vancouver. Petitioner did first testify that he operated a retail station at Astoria, Oregon, through an employee or partner (A. 158; Tr. 1575, 1591). However, when the corporate records were produced, they showed that the station was an account of the Oregon corporation (Exh. 284A, A. 563) and that petitioner leased the station for a flat monthly rental (Tr. 2727-2728).

17. Petitioner's statement that before 1955 he "enjoyed growth and financial success" (Br. 20) is at odds with his own chart of his sales operations submitted to the court of appeals (p. 45, Br. of Appellee; see p. 35-36, note 35, *infra*). That chart shows that Perkins' jobber operations had sustained continuous losses since 1953. There was a greater decline (approximately 26%) in Perkins' gasoline sales during the two years before Regal opened and allegedly ruined his business (1954 and 1955) than during the next two years (about 13%) which encompassed Regal's operations (1956 and 1957).

In the court of appeals, Perkins attempted to explain the 1954 decline in part by stating that Standard in that year supplied one of his customers directly (Brief of Appellee, p. 43). (FOOTNOTE CONT NEXT PAGE)

In November 1957, Clyde Perkins terminated his contract with Standard and leased or subleased his service stations to Westway Petroleum Company, a subsidiary of Standard's competitor, Union (Exh. 1003). His personal status as a landlord remained unchanged. Under the new agreement, Westway replaced Standard as the supplier of gasoline sold through Clyde Perkins' stations.

6. THE RELEVANT SALES AREAS AND PRICES

Perkins operated in three disconnected areas in southwestern Washington and western Oregon, extending generally from Olympia south to the California border, as the map reproduced at A. 587 shows. In this territory he distributed Standard's gasoline and fuel oil under his own brand name in 33 localities (Exhs. 284A, 284B, A. 563). In his brief (Br. 14-18), petitioner refers to two areas, first, Centralia and Seattle, Washington, and second, Vancouver, Washington, and Portland, Oregon.

1. CENTRALIA AND SEATTLE, WASHINGTON

Centralia is a small town about 83 miles south of Seattle. We discuss it in some detail only because petitioner emphasizes it in his brief (*e.g.*, Br. 14-15, 18), and because it is the basis of the one claim of injury from sales to Signal not involving Regal.

Standard first began to supply Signal in the Northwest in 1955, when Signal commenced liftings of gasoline at Standard's terminal near Seattle (A. 203). Perkins, on the

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To support that statement, he referred the court to *Perkins v. Standard Oil Company* (1963) 235 Or. 7, 383 P.2d 107, 1002. The claims made in that case for loss of the account were not "settled" as stated in petitioner's brief (Br. 46, n. 34). Perkins in fact dismissed that case with prejudice before trial without the payment of any consideration.

other hand, did not buy from Standard in Seattle (Exhs. 2, A. 493; 1448, p. 14), and there is no evidence that he marketed Standard gasoline there. Rather, in Seattle he bought gasoline from Westway, a subsidiary of Union (Exhs. 235, 1459A). Signal resold all of the gasoline it lifted from Standard in Seattle to various jobbers, including one B. F. Harris, a distributor in Seattle.[18] In Centralia, Perkins supplied one Les Carter with gasoline purchased from Standard. There was no evidence[19] that Signal sold gasoline to anyone in Centralia, directly or indirectly.[20] Therefore nothing in regard to Centralia is of relevance to petitioner's claims resulting from Standard's sales to Signal.[21]

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18. Petitioner refers to B. F. Harris as a "trucker" (Br. 14). But the evidence was that B. F. Harris was a jobber who bought and sold petroleum products (Tr. 1048, 1051, 1055), operated storage facilities (Tr. 1047, 1051) and service stations (Tr. 1048-1049) as well as tank trucks to service these facilities (Tr. 1052). B. F. Harris should not be confused with Robert Harris, with whom petitioner, along with Powell, signed the supply agreement with Standard.

19. The categorical statement in the text does not require qualification because of the following: B. F. Harris, who was supplied by Signal, testified that he could recall no sales in Centralia, but if there had been "it was some infinitesimal quantity that didn't amount to anything" (A. 283). Petitioner says Signal entered the Centralia market as a wholesaler (Pet. Br. 14), but the cited record references do not support the assertion. Allen Perkins, son of Clyde Perkins, testified he observed "deliveries" to Carter in Centralia from Seattle but did not specify that the deliveries were gasoline or that they came from Signal or Harris (Tr. 2988, 3080-3081) (see also note 20, *infra*).

20. Petitioner says that Signal's lower price to a "trucker"—which could only refer to B. F. Harris—enabled the trucker in Centralia to take away the business of some customers of Perkins. This is incorrect. Perkins (selling gasoline bought from Westway, not Standard) did compete with Harris for Carter's business—but in Seattle (Tr. 1689-1690; Exh. 235), not Centralia. And in fact Perkins lost the Carter account in Seattle not to Signal or a Signal-supplied jobber, but rather to Westway (Exhs. 235, 1504A).

21. Petitioner states that price wars were initiated in Centralia by retail stations "to which Signal had passed the benefits of

7.

As to Standard's sales to its branded dealers in Centralia, we already have noted that the record shows that for one week in October 1956, five such dealers had a price advantage on one grade of gasoline of approximately one cent over Perkins (p. 13, *supra*). There was no evidence that Perkins or any of his customers lost trade to those dealers.

II. VANCOUVER, WASHINGTON, AND PORTLAND, OREGON

Vancouver, Washington, where Perkins operated, is just across the Columbia River from Portland, Oregon, where Regal operated. In Portland, gasoline was sold at retail by eight major oil companies (Tidewater, Richfield, Shell, Texaco, Union, Mobil, Enco (Standard of New Jersey) and Standard) and by some 156 independent stations selling various brands (Tr. 4917; Exh. 1683). As petitioner and his witnesses acknowledged, there were constant price wars there, beginning as early as 1953 (A. 327; Tr. 4923-4924), two years before Standard sold any gasoline to Signal in the Northwest. These price wars continued to the time of trial in 1963, (Tr. 973-974), six years after Standard stopped selling to Signal. Perkins' marketing expert thought the continuous price wars were not attributable to any particular retailer or chain of retailers, but rather to a variety of factors including a surplus of gasoline resulting from the termination of the Korean War and the subsequent expansion of refining facilities (A. 277-279).

Signal began purchasing gasoline from Standard's Willbridge plant, near Portland, on August 27, 1956 (Tr. 4318;

Standard's price discriminations in its favor" (Br. 14, citing Tr. 1282, 1313-1316 and 1341). The designated testimony makes no reference whatsoever to Signal's passing on a price advantage. Elsewhere in the record petitioner testified that he told his manager to meet the price of Signal (Tr. 1313). However, neither this testimony nor that cited supports the proposition that Signal or any customer of Signal supplied any retail stations in Centralia.

Exhs. 1550A-1 through 1550A-4). It sold this gasoline to Western Hyway, which in turn sold to the three Regal stations in Portland. When Regal opened in Portland in September 1956, Perkins was buying gasoline from Standard for his market in Vancouver at a *lower* price than Signal was paying. Beginning in January 1957, Signal, as a result of the amendment to its over-all contract with Standard, had a price advantage over Perkins of from thirty-six one-hundredths to forty-five one-hundredths of a cent per gallon (and for two days, sixty-eight one-hundredths of a cent).[22]

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22. Exhibit 1550 compares the prices Signal and Perkins paid Standard for gasoline resold in the Vancouver-Portland area:

Date	Signal Oil and Gas Company — Net Prices — Regular	Ethyl	C. A. Perkins Net Proceeds Payable to Standard at Willbridge—Destination — Vancouver—Ex Tax — Regular	Ethyl	Difference Between Signal Oil and Gas Company Net Prices and C. A. Perkins — Net Proceeds — Regular	Ethyl
*8/27/56-12/31/56	.129	.149	.1262	.1462	.0028	.0028
1/ 1/57- 1/16/57	.1224	.1424	.1262	.1462	(.0038)	(.0038)
1/17/57- 3/18/57	.1274	.1474	.1312	.1512	(.0038)	(.0038)
3/19/57- 3/25/57	.1274	.1474	.131035	.151035	(.003635)	(.003635)
3/26/57- 3/31/57	.1274	.1474	.131035	.151035	(.003635)	(.003635)
4/ 1/57- 4/ 2/57	.1272	.1472	.131035	.151035	(.003835)	(.003835)
4/ 3/57- 6/17/57	.1292	.1512	.133035	.155035	(.003835)	(.003835)
6/18/57- 6/21/57	.1292	.1512	.133035	.155035	(.003835)	(.003835)
6/22/57- 6/23/57	.1292	.1512	.136035	.158035	(.006835)	(.006835)
6/24/57- 6/30/57	.1322	.1542	.136035	.158035	(.003835)	(.003835)
7/ 1/57-11/20/57	.1315	.1535	.136035	.158035	(.004535)	(.004535)
11/21/57-12/ 2/57	.1315	.1535	.13587	.15787	(.00437)	(.00437)

*Date of first delivery to Signal Oil and Gas Company at Willbridge.

In January 1957, a payment was agreed upon and made by Standard to Signal Oil and Gas Company upon the basis of $.0065 per gallon of gasoline delivered by Standard to Signal Oil and Gas Company during the period 8/27/56 through 12/31/56.

Contrary to petitioner's statement (Br. 53, note 37), neither petitioner's Exhibits 93 I, M and N (A. 546-547), nor any other evidence, casts doubt either on the accuracy of Exhibit 1550 or the validity of its use to compare Perkins' and Signal's prices. Exhibit 1550 correctly sets forth prices to Perkins f.o.b. Willbridge for deliveries to Vancouver and compares them to Standard's prices to Signal f.o.b. Willbridge. Petitioner's Exh. 93 I (A. 546), and its

From the day Regal first opened in September 1956, until June 22, 1957, Western, the wholesaler supplying Regal, paid *higher* prices to Signal for the gasoline resold to Regal than Perkins paid to Standard for the gasoline he wholesaled to his customers. Thereafter, until the end of the claim period on November 1, 1957, Western's price advantage over Perkins, at the wholesale level, was thirty-five ten-thousandths of a cent, except for the last three weeks that Perkins was in business, when Western's price advantage was about one tenth of a cent.[23]

There is no evidence in the record of the price at which Regal purchased gasoline from Western.

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replica, 82D (A. 530), merely reflect a price to Perkins f.o.b. Willbridge for deliveries without freight allowance. Those exhibits eliminate freight allowances of 33 to 36 hundredths of a cent per gallon which Perkins concedes were deducted from the purchase price he paid on deliveries to Vancouver. As to these facts, there is no conflict of record. Indeed, petitioner offered as his own exhibits (Exhs. 354-A-Y) Standard's schedules (Exhs. 1450B-Z), showing Standard's price and freight allowances on gasoline, including the price f.o.b. Willbridge, destination Vancouver (Exh. 1450-S), compared on Exhibit 1550 above (Tr. 6045-6046).

23. The following chart shows the prices paid by Perkins (to Standard, destination Vancouver) and by Western (to Signal):

	Ethyl		Regular	
Date of Change	Standard's price to Perkins, destination Vancouver(1)	Signal Oil and Gas Company's price to Western Hyway(2)	Perkins payable to Standard, destination Vancouver(1)	Signal Oil and Gas Company's price to Western Hyway(2)
8/27/56	14.62	15.30	12.62	13.30
1/17/57	15.12	15.30	13.12	13.30
1/24/57	15.12	15.80	13.12	13.80
3/19/57	15.1035	15.80	13.1035	13.80
4/ 3/57	15.5035	15.80	13.3035	13.80
4/15/57	15.5035	15.80	13.3035	13.60
6/22/57	15.8035	15.80	13.6035	13.60
11/ 1/57	15.8035	15.70	13.6035	13.50
11/21/57	15.787	15.70	13.587	13.50

Source: (1) Exh. 1550.
(2) Exh. 1458-A.

4. The decision of the court of appeals.

The court of appeals reversed the judgment for petitioner and remanded the case for a new trial. It held that a substantial portion of the award rested on the activities of Regal and that no claim of damage could be based on that company's activities, since it was neither a customer of Standard nor a customer of the favored purchaser from Standard (A. 108-109).

The court of appeals further held that it was error to submit to the jury Perkins' claims of Standard's alleged violations of Sections 2(d) and 2(e) with respect to branded dealers to the extent that Perkins operated as a wholesaler, leaving Perkins free on retrial to show damages for such violations, if any, to the extent he operated as a retailer (A. 103-104, 111-112).[24] It further held that certain damage items of Perkins as an individual were erroneously submitted to the jury (A. 112-115), and that the trial court erred in admitting damage computations which were misleading and not supported by the evidence (A. 115-116). It also held that the trial court erred in the exclusion of evidence and in its instructions to the jury relating to respondent's "good faith meeting of competition" defense (A. 116-117). Finally, the court of appeals adverted to numerous other errors urged by respondent which it said it would not pass upon for the reason that it felt that such errors were not likely to occur in a new trial. The court expressly stated that its failure to discuss these errors was not to be taken as appellate approval of the rulings complained of (A. 117).

24. On this point we simply do not understand petitioner's assertion that the court below found no error at all involving Perkins' §§ 2(d) and 2(e) claims (see Br. 24).

SUMMARY OF ARGUMENT

I

Petitioner's basic contention is that the court of appeals, in denying recovery for Regal's acts, erred in applying the Robinson-Patman amendments, which do not extend to fourth-line competition. Rather, petitioner argues, the court should have applied the competitive effects standard re-tained from the original provisions of Section 2(a) of the Clayton Act.

At the outset, we point out that it is immaterial which provisions of the Act are relied upon. The small price differential in favor of Signal was not passed on and had no effect upon competition with Regal or upon competition in general. Further, there was no price advantage in favor of Standard's branded dealers, save for one immaterial incident when, for one week in one price zone in one town, the price of one grade of gasoline to five dealers was 1 cent lower than the price to Perkins.

II

The court of appeals held that the Robinson-Patman Act did not apply to the alleged injury to competition with Regal, since Regal operated at the fourth level of competition. This ruling is required by the specific language of the statute, which makes actionable price discriminations affecting competition with "any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." As this Court pointed out in *Federal Trade Comm'n. v. Sun Oil Co.* (1963) 371 U.S. 505, 514-515, Congress knowingly defined the levels of competition to which it intended the amendment to apply.

The specific language of the amendment is consistent with the congressional purpose. Congress intended to provide a less onerous burden of proof than that demanded by the

original Section 2 by requiring a showing of injury only to competition with particular competitors, rather than to competition in an entire market. The limitation of the levels of competition to which the Act was made applicable reflects a reasonable judgment that the impact of a price discrimination ordinarily may be expected to be felt, free of intervening factors affecting competition, by those no more remote than the third level of competition.

III

In this Court, petitioner casts his principal argument in terms of the competitive effects provisions retained from the original Clayton Act, which makes actionable a price discrimination that affects competition in a line of commerce generally. Petitioner, however, did not raise that issue below and, therefore, the court below had no opportunity either to engage in meaningful market analysis or to assess this voluminous record in light of petitioner's contention. In any event, as we show in Part I of our argument, petitioner failed to prove that the price discrimination affected competition in general or with Regal.

IV

Petitioner argues that the court below should have treated this as a second-line, rather than as a fourth-line case. The argument is premised upon two factual contentions: (1) that Perkins was in competition directly with Signal at the secondary level, and (2) that competition with Regal was actually competition with Signal since Regal was a mere tool of Signal. Neither of these contentions was proved. Petitioner and Signal were not competitors at the secondary level. They operated in entirely separate channels of distribution. Neither competed for the customers of

the other. The alleged competitive impact occurred at the retail level between customers of Perkins and sellers twice removed from Signal. It appears to be petitioner's theory that every non-primary line case is a secondary-line case, regardless of how far below the original purchasers the competitive impact may occur. This is contrary to the realities of the marketplace. It would also render superfluous the congressional delineation of the distinct levels of competition upon which the adverse impact must occur in order to found an actionable claim under the Robinson-Patman Act.

Respondent's second contention—that Signal controlled the prices of Regal—is simply without any factual foundation.

V

In the final section of our brief, we advert to numerous other trial errors, some passed upon by the court of appeals and others specifically reserved by that court. We are constrained to discuss them to show their substantiality because of petitioner's request that the judgment of the trial court be reinstated should this Court determine the issues before it in petitioner's favor. These errors, we submit, preclude such relief.

ARGUMENT

I. Lack of causation: Sales to Signal did not violate Section 2(a) because the price differential to Signal was not the cause of any effect on competition with Regal and was not the cause of a substantial lessening of competition in the market.

Section 2(a) of the Clayton Act, in its original form and as amended by the Robinson-Patman Act, does not prohibit all price discriminations. It cannot be interpreted to require "price uniformity and rigidity in open conflict with

the purposes of other antitrust legislation" (*Automatic Canteen Co. v. F.T.C.* (1953) 346 U.S. 61, 63). Nor does a price discrimination alone support an inference of an adverse effect on competition. As this Court has recognized "there are no overtones of business buccaneering in the § 2(a) phrase 'discriminate in price.' Rather, a price discrimination within the meaning of that provision is merely a price difference" (*F.T.C. v. Anheuser-Busch, Inc.* (1960) 363 U.S. 536, 549).

Only price discriminations which may have the "effect of" injuring competition are prohibited (15 U.S.C. 13(a)). Thus, in every Section 2(a) case a crucial element of proof is the causal connection or nexus between the price difference and the asserted competitive injury (Rowe, Price Discriminations Under the Robinson-Patman Act (1962) pp. 125, 186-203). Petitioner, of course, recognizes the need for such causal connection by repeatedly asserting (*e.g.*, Br. 17, 27, 48) that Standard's price differential to Signal was "passed on" by Signal to Western and by Western to Regal. There is, however, no evidence in the record to support these statements.[25]

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25. In the absence of evidence of the prices paid by Regal, petitioner repeatedly refers explicitly (Br. 17, 19 and note 19, 54, 64, and 65) or implicitly (Br. 27, 48, 49-50) to his own testimony of a conversation between two Standard employees (see Br. 19, note 19, citing A. 189, 201). Petitioner testified that one employee said to the other "I want you to stop Regal *from going* to the Northwest . . . *if they do* they will wreck the market because they have got a better price than either Clyde or my other jobbers have up there, and *if they come* up there they *will* do the same thing there they have done other places." The second employee said "I can't control it [Signal]" (emphasis added).

The conversation obviously took place before Regal entered the market in the Northwest with gasoline purchased from Western and, of course, is not evidence of the price later paid by Regal. It simply shows that Standard could not control, and refused to attempt to control, Signal's resale customers or prices. In any event, the undisputed invoice evidence shows that Signal, during all of the

Accordingly, even if it be assumed that the merchandising and pricing policies of three Regal stations in Portland adversely affected Perkins wherever he operated, from Olympia, Washington, south to the California border, there is no evidence that Standard's price to Signal was the proximate cause of the acts of Regal or of any effect they may have had on Perkins. The court of appeals did not rule on this point. It recited the adverse effects of Regal's marketing practices but, significantly, did not find that there was a causal connection between Standard's price to Signal and Regal's prices or marketing practices.

In addition, the lower price to Signal—which did not start until January 1957, four months after Regal had opened its first station and precipitated the price wars—gave Signal an advantage over Perkins of from 33/100th to 45/100th of a cent per gallon, except for two days when it was 68/100 cents per gallon (Exh. 1550, *supra*, p. 21, note 22). Quite apart from the fact that this small differential was not passed on by Signal to Western, or by Western to Regal, it could not have been the cause of the 4-cent drop in Portland's retail prices (Br. 16), or of Regal's underpricing of Perkins' Vancouver station by 2 to 6 cents per gallon (A. 251-256; Tr. 657, 703-706, 709), or, *a fortiori*, of the ruinous price wars throughout Perkins' entire 55,000 square mile marketing area. As we have noted, years after Standard had ceased supplying Signal, the Regal stations were still operating in the same manner as that to which Perkins attributed his injury (A. 343; Exh. 106C, A. 559. Exhs. 106D and E)

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relevant period, charged Western either a higher price, or approximately the same price, as Standard charged Perkins. Thus, Signal in fact absorbed, rather than passed on, the small price advantage it had from Standard (Exhs. 1458A, 1550, *supra*, p. 21, note 22)

Significantly, petitioner at no place in his brief ever refers to the size of these differentials or seeks to explain how (even if they had been passed on to Regal as they were not) they enabled Regal to drive the price of gasoline down 4 cents a gallon (Br. 16), "to 'wreck' the Pacific Northwest market" (Br. 64) and to cause "Perkins' destruction" (Br. 63), and produced the "catastrophic" impact upon Perkins' theretofore "successful and expanding business" which drove it from the market (Br. 13).

Turning from the Regal situation, there was no evidence of any causal connection between Standard's price to Signal and Perkins' claimed injury in Centralia. Perkins' claim was that B. F. Harris, one of Signal's Seattle jobbers, was able to acquire a customer of Perkins, one Carter, in Centralia (83 miles south of Seattle) because of Standard's lower price to Signal. In fact, B. F. Harris did not market gasoline in Centralia (A. 282-283), and there is no evidence that Perkins lost the Carter account to Signal or to a customer of Signal (p. 19, notes 19 and 20, *supra*). Actually, during most of the relevant period of March to October 1955 (Exh. 235), Harris, the Signal jobber with whom Perkins was competing in Seattle (*not* Centralia), paid Signal a higher price for gasoline than Perkins paid to Standard for gasoline sold in Centralia (Exh. 1450W; Tr. 1061-1063).[26]

Turning finally to Standard's branded dealers, there was no evidence that Standard's treatment of them adversely

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26. The only specific evidence in the record of Signal's prices to B. F. Harris are invoices which show that during the 171 days in which Harris sold to Carter in Seattle, *i.e.*, from March 2, 1955, to August 19, 1955, Perkins had a price advantage over Harris for 162 days on regular gasoline and 89 days on ethyl gasoline (Exh. 1450W; Tr. 1061-1063). Harris vaguely recalled that sometime during the many years he dealt with Signal he received additional adjustments but gave no testimony directly relevant to the time period here in issue (Tr. 1055, 1065, 1068-1069).

affected competition generally or Perkin's individually anywhere in the Northwest. We discuss this later in this brief (p. 48, *infra*).

The court of appeals did not rule upon any of the issues relating to causation, which, we submit, are determinative of this case.

II. Petitioner did not establish liability under the Robinson-Patman Act amendments to Section 2(a). These amendments do not extend to fourth-line competition, the level on which Regal operated.

Standard sold gasoline to Perkins, a wholesaler. At the same time it sold gasoline to Signal, an integrated oil company, which in turn resold it to Western, a wholesaler, which in turn resold it to Regal, a retailer, which allegedly cut prices to the injury of petitioner. Thus, the alleged injury occurred at the fourth level of distribution—by a customer (Regal) of a customer (Western) of the favored customer (Signal) of the original seller (Standard).

The court of appeals ruled that a substantial part of the damages assessed in this case rested upon the marketing practices of Regal; that Regal was not a customer of a customer within the purview of Section 2(a); and that the effect exerted by Regal upon competition is not attributable to Standard under that section (A. 108-109). In so ruling, the court of appeals had reference solely to the Robinson-Patman amendments to Section 2(a).[27] We submit that its ruling is correct.

27. The court below did not construe the provisions of Section 2(a) which were retained from the original Clayton Act and upon which petitioner principally relies because, as we show later (pp. 35-37, *infra*), no issue was presented below under these provisions. The court of appeals confined its decision to the "relevant provisions of the Robinson-Patman Act, relied upon by Perkins," which the court specifically delineated (A. 107, n. 3).

Section 2(a) of the Clayton Act (15 U.S.C. 13(a)), as amended by the Robinson-Patman Act, prohibits a price discrimination, the effect of which may be:

> "* * * to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

The proponents of the Robinson-Patman Act intended to provide a less onerous burden of proof than that demanded by the standard of Section 2 of the original Clayton Act (see Br. 55-56). Thus, the amendments require only a showing of injury to competition with specific competitors, rather than to competition in an entire market generally (see S.Rept. 1502, 74th Cong., 2d Sess., p. 4 (1936); H. Rept. 2287, 74th Cong., 2d Sess., p. 8 (1936); Hearings before a Subcommittee of the House Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 2d Sess., p. 271 (1936) (statement of H. B. Teegarden)). But in an action brought under its provisions the plain language of the amendment requires that the discrimination relied on shall have caused an impairment of competition with the seller (primary-line), with the favored purchaser (secondary-line), or with customers of the favored purchaser (third-line).[28]

We know of no case in the thirty-three years since the Robinson-Patman Act added the above language, in which

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28. In determining the relevant level of competition beyond the primary line, it is clear that one counts down the favored distributive chain. The act speaks of injury to competition *with* someone, and that can only be one who is favored by the discrimination and thereby gains an unfair competitive advantage, *i.e.*, the favored purchaser, or a customer of the favored purchaser to whom the lower price has been passed on (see, *e.g.*, Austin, Price Discrimination and Related Problems under the Robinson-Patman Act (2d ed. 1959) p. 51; Rowe, Price Discrimination under the Robinson-Patman Act (1962) p. 196 n. 97).

it was contended that the statute reaches customers more remote than the third level.[29]

The chairman of the House subcommittee which considered the bill specifically stated that the act was intended to extend only to the third line of competition, *i.e.,* to customers of either "the grantor or grantee" (80 Cong.Rec. 9417 (1936) (remarks of Rep. Utterback)).

By enacting the statute, Congress expressly demonstrated that it knew how to define the levels of competition to which it intended the amendment to apply (*Federal Trade Comm'n v. Sun Oil Co.* (1963) 371 U.S. 505, 514-515). The specific language of the amendment is entirely consistent with the congressional purpose and is confined to those levels of competition where a price discrimination can reasonably be assumed to have an identifiable impact upon competition with a particular marketer. Congress defined the limit of these levels to be the tertiary line, in this case Western Hyway.[30]

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29. All of the commentaries on the act discuss its application only upon the three designated levels: primary, secondary and tertiary (see, *e.g.,* Rowe, Price Discrimination under the Robinson-Patman Act (1962), p. 37, 141-205; Patman, Complete Guide to the Robinson Patman Act (1963), p. 47-49; Kintner, An Antitrust Primer (1964) pp. 61, 64-68.

30. As petitioner apparently recognizes, nothing in this Court's decision in *FTC v. Fred Meyer, Inc.* (1968) 390 U.S. 341, suggests reading the word "customer" in Section 2(a) as meaning other than a direct customer of the grantor or recipient of the discrimination. To be sure, *Fred Meyer* held that the word "customer" in Section 2(d) encompassed a retailer who purchased through a wholesaler and who was the competitor of the retail purchaser that received promotional payments. But the effect of that holding is merely to make Sections 2(d) and 2(e) of the act coextensive in scope with the principal provision, Section 2(a). Were it otherwise, the prohibition against price discrimination in such a situation (see *Trade Comm'n v. Morton Salt Co.* (1948) 334 U.S. 37, 55) could be avoided through the guise of giving promotional payments or services.

There are good reasons for stopping the inquiry on competitive effects at the third level. To go further down the ladder would require consideration not only of the question whether the price advantage was passed on but consideration of numerous intervening factors as well.[31] The fact that other jobbers supplied by Standard in the Northwest did well while paying prices comparable to the price paid by Perkins (see p. 17, *supra*) indicates that there were indeed intervening factors which caused or permitted Regal adversely to affect petitioner's market. Did Perkins exact an inordinately large margin from his customers?[32] Did the service stations supplied by him fail to gain the public acceptance enjoyed by the customers of Standard's other jobbers? Were the service stations operated by Regal and by others who increased their sales better located than those supplied by Perkins? Were the operators of the Regal and other stations more efficient? Such questions would multiply to the point that a trial would become utter confusion. Thus, Congress wisely limited the scope of the Robinson-Patman

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31. Examples have occurred in situations less remote than a fourth-line case. Thus, the recipient of the price advantage might have been able to obtain an equally low price from a competitor of his supplier, a fact which would negate the casual connection between the grantor's price and claimed injury to the disfavored purchaser (see *American Oil Company v. F.T.C.* (7 Cir. 1963) 325 F.2d 101, certiorari denied (1964) 377 U.S. 954). Also, if petitioner really could have obtained a lower price from someone other than Standard, as he contends (Br. 18), his failure to do so would negate injury from Standard's price (see *Tri-Valley Packing Association v. F.T.C.* (9 Cir. 1964) 329 F.2d 694, 703-704). And a failure to exploit one's competitive possibilities would be a factor influencing causation (see, *e.g.*, *Alexander v. Texas Company* (W.D. La. 1958) 165 F.Supp. 53, 58).

32. In a deposition, Allen Perkins averred that a gross profit of one cent per gallon was adequate in the Perkins jobber operation (Tr. 3435-3436). Petitioner made a much larger gross profit on the bulk of his sales (Exh. 1457A, col. (4)).

amendments to the third level. Indeed, the record in this case demonstrates that proof of causation further down a chain of distribution deteriorates into impermissible guesswork and speculation.[33]

This Court has recognized the importance of reconciling the prohibitions of Section 2(a) with the broader antitrust policies of the Sherman Act (*Automatic Canteen Co. v. F.T.C.* (1953) 346 U.S. 61, 74). Pricing is the "central nervous system of the economy" (*U.S. v. Socony Vacuum Oil Co.* (1940) 310 U.S. 150, 226). The strong policy in favor of encouraging competition—including price competition—might well be thwarted by extending the reach of the Robinson-Patman "competitive effects" provision beyond the third level.[34] Those who make pricing decisions will be less likely to engage in price competition if unable to foresee whether subsequent purchasers more remote than a customer's customers would receive the benefit of a lower price to the immediate buyer. Permitting those who compete with remote purchasers to sue and to ascribe all declines

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33. For example, petitioner's marketing expert testified it was Regal's new marketing concept, advertising campaign and its sales promotion and service to the public—not gasoline prices—which "had the major impact" (A. 276-277). While the court of appeals adverted to Regal's "well publicized entry into the market" as well as its low prices, it did not attribute either to Standard's prices to Signal.

34. The danger of encouraging resale price maintenance by applying the competitive effects provisions even to the third level is highlighted by the abandonment by the Solicitor General of a portion of the F.T.C.'s order before the Supreme Court in *Standard Oil Co.* (1953) 49 F.T.C. 923, 956, vacated (7 Cir. 1956) 233 F.2d 649, affirmed (1958) 355 U.S. 396 (see the Reply Brief for the Federal Trade Commission in that case, No. 24, Oct. Term, 1957, p. 32). There the Commission's superseded order had prohibited Standard of Indiana from selling to retailers at higher prices than its wholesale customers charged their customers which competed with the retailers.

in their sales and the prospering of their competitors to the price of a seller three times removed would inevitably tend to have a chilling effect upon price competition. And surely it would jeopardize legitimate pricing techniques to permit speculation as to the marketing repercussion of even minimal price differentials in complex marketing situations where a multiplicity of factors are involved.

We note and emphasize that petitioner virtually concedes the correctness of the decision of the court below on this point (Br. 25). Its whole argument is directed to an effort to show some basis for liability under the original provisions of Section 2(a) or on the theory that injury occurred here on the secondary-line. We turn now to these contentions.

III. The original language of Section 2(a) of the Clayton Act: Petitioner is not entitled to a reversal of the decision of the court of appeals on the basis of the original language of Section 2(a) of the Clayton Act. This question was not presented to, or passed upon, by that court. In any event, it is without merit, since petitioner failed to establish that the effect of Standard's price to Signal was substantially to lessen competition.

It is true that the court of appeals "completely ignored the original Clayton Act standard" (Br. 37). It did so, however, because petitioner raised no issue in that court under that part of Section 2(a).[35] Petitioner first mentioned that

35. In his Reply Brief for Petitioner (p. 4) filed in response to our brief in opposition to the petition, petitioner states that in the court of appeals petitioner argued that Standard's discriminations "lessened competition throughout the entire Pacific Northwest market, aggravating existing tendencies towards monopolization." This is not correct. In support of this statement, petitioner refers to pages 28-31 and 38-42 of Brief of Appellee in the court below. The only reference to original Clayton Act language in petitioner's some 300-page brief filed there is found in a heading in the statement section of the brief containing the words: "The price discrimi-

separate standard, and first cited the case upon which he now principally relies,[36] in the court of appeals in his "Answer of Appellee to Response to Petition for Rehearing" (pp. 6-7).[37] Even there, however, petitioner's discussion of the original Clayton Act standard was limited to his contention that he competed at the secondary level with Signal.

The objection to petitioner's raising this issue for the first time before this Court is more than a technicality. Because the issue was not raised in the court of appeals, that court had no reason to appraise the effects, if any, of the discrimination (assuming, contrary to the fact, that it was passed on to Regal) upon a line of commerce generally. Nor did the court of appeals have an opportunity to define the relevant market or markets or determine whether within the market or markets there was in fact or probability a substantial lessening of competition, apart from some particular effect on Perkins.[38]

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nation admitted here aggravated the tendencies toward monopolization" (p. 38). Neither the material following that heading nor argument elsewhere in the brief, urged that the asserted price discriminations substantially lessened competition or tended to create a monopoly as provided by Section 2(a).

For the convenience of the Court, we have lodged with the Clerk a copy of petitioner's brief and other documents he filed in the court below.

36. *Van Camp & Sons v. Am. Can Co.* (1929) 278 U.S. 245. We do not dispute petitioner's right to rely upon the original Clayton Act theory upon retrial.

37. Following the court's decision directing a new trial, petitioner filed a "Motion for Clarification" and a Petition for Rehearing. The court of appeals entered an order on April 18, 1965, requesting Standard to respond and giving petitioner opportunity to answer its response. The document referred to in the text above is that answer.

38. In footnote 6 to its opinion (A. 108, n. 6) the court of appeals stated by way of dictum that substantial evidence supported Perkins' position that the price war started by Regal spread into a "major conflagration" with an impact "far beyond Portland," in a "chain-reaction throughout Perkins' entire market area." But the

The whole thrust of the case in the trial court was directed at alleged injury to Perkins, and not to competition generally.[39] Questions of the definition of the geographic and product markets were nowhere outlined in the instructions. To say now that the "retailing and wholesaling of gasoline in the Pacific Northwest" (Br. 26) is the proper market definition is to substitute *post hoc* characterizations for meaningful market analysis.

In any event, as we have shown (see pp. 26-30, *supra*) petitioner failed to prove that the competitive effect he says occurred in the asserted market was "the effect of" the small discrimination in favor of Signal. There was no evidence that the activities of Regal were caused by that discrimination. For the same lack of causation, petitioner's original Clayton Act theory cannot be upheld with respect to sales to Signal in Seattle nor with respect to the miniscule one week's price discrimination in favor of five Standard dealers in one small town (see pp. 45-46, *infra*).

IV. No secondary-line case: Petitioner did not compete with Standard's purchaser, Signal, or Signal's customer, Western Hyway, and there was no evidence that Signal directed the acts of Regal.

Petitioner's claims of secondary-line injury cognizable under the Robinson-Patman amendments to Section 2(a)

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court specifically stated that the extent of this showing was an adverse effect upon the "business carried on by Perkins." There was no finding of injury to competition generally, in any specified market or markets. And it does seem doubtful that prices at three service stations in Portland could have this effect on competition generally, from central Washington to the California border.

39. This is not surprising, since, so far as we are aware, there has not been a private price discrimination case brought under the original Clayton Act "competitive effects" provision since the Robinson-Patman Act was passed.

are twofold: (1) that he was in competition directly with Signal at the secondary level (Br. 58-62), or (2) that the separate corporate entities of Signal, Western, and Regal should be disregarded on the ground that Signal directed the acts of Regal (Br. 63-66).

A. PETITIONER AND SIGNAL WERE NOT COMPETITORS WITHIN THE MEANING OF THE ROBINSON-PATMAN ACT.

The Robinson-Patman amendments to Section 2(a) are not violated unless the effect of the price discrimination may be

> "* * * to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

As we have shown in Part II hereof, the intent of Congress, unmistakably expressed, was to protect only competition with the originating seller (primary-line), with the favored purchaser (secondary-line), or with customers of the favored purchaser (third-line). There is no secondary-line case here because petitioner was not in competition with Signal, the favored customer, or with Western, which purchased from Signal. *Trade Comm'n v. Morton Salt Co.* (1948) 334 U.S. 37, relied on by petitioner, is not to the contrary. There, retail customers of the non-favored wholesaler were injured in their competition with the favored direct-buying retailer, which of course impaired secondary-line competition with the favored "customer" of the discriminating seller.

Competition is "an endeavor to get the same trade from the same people at the same time" (*Beech-Nut Packing Co. v. P. Lorillard Co.* (3 Cir. 1925) 7 F.2d 967, 970). It "is not a technical legal conception, but a practical one, drawn

from the course of business."[40] Thus, it has been held that no secondary-line injury can result where the purchasers do not in fact compete because of territorial barriers (see, *e.g.*, *Davidson v. Kansas City Star Company* (W.D.Mo. 1962) 202 F.Supp. 613, 618-619, reversed on other grounds sub.nom. *Bales v. Kansas City Star Company* (8 Cir. 1964) 336 F.2d 439), or because one purchaser is in fact a user of the product and the other a reseller (see, *e.g.*, *Shell Oil Co., et al.* (1958) 54 F.T.C. 1274, 1279; cf. *Minneapolis-Honeywell Reg. Co. v. Federal Trade Com'n* (7 Cir. 1951) 191 F.2d 786, 792) or, more significantly, because the two channels of distribution (or resale) in which the purchasers engage are separate, with no practical opportunity for them to solicit each other's accounts. For example, in *Shell Oil Co., supra,* a taxicab association bought gasoline at a favorable price and resold it to its members as well as to the public (51 F.T.C., at 1275). The Commission held that to the extent that the association sold gasoline to its members it was not in competition with other stations (51 F.T.C., at 1279, 1280). And in *E. Edlemann & Co.* (1955) 51 F.T.C. 978, 983-984, affirmed (7 Cir. 1956) 239 F.2d 152, certiorari denied (1958) 355 U.S. 941, it was recognized that if one channel of distribution were foreclosed to the complaining purchaser because it was composed of franchised dealers who bought only from their franchisor, then a price discrimination could have no anti-competitive effect, because "competition would be aborted or foreclosed regardless of price" (see also *Chicago Sugar Co. v. American Sugar Refining Co.* (1949) 176 F.2d 1, 9-10).

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40. *The Quaker Oats Co.,* 1963-1965 CCH Transfer Binder FTC Complaints, Orders, Stipulations, par. 17,134, p. 22,215 (Elman, Comm'n'r), quoting *Swift & Co. v. United States* (1905) 196 U.S. 375, 398.

Lack of competition between purchasers often follows functional differences (cf. *General Foods Corp.* (1956) 52 F.T.C. 798, 824); the test is not one of labels (*e.g.*, wholesaler, retailer) but whether the "purchasers * * * in fact compete" (*Fed. Trade Comm'n v. Ruberoid Co.* (1952) 343 U.S. 470, 475).[41]

Thus, in practical terms, petitioner and Signal were not in "competition" with one another at the secondary level. They operated in entirely separate channels of distribution. Signal sold only to Western, and Perkins sold only to certain small distributors, such as his nephew Fraser, and to certain retail station operators, most of whom were tied to him by leases and all of whom marketed under his brand name "Champion." At no time did Perkins seek, or compete with Signal for, the business of Western. Indeed, Perkins could not have sold to Western or its customer, Regal, because he had precluded himself from marketing in Portland by his agreement with Powell and Robert Harris (p. 16, *supra*). Moreover, large resellers do not as a trade practice purchase from jobbers such as Perkins (see *Secatore's, Inc. v. Esso Standard Oil Company* (D.Mass. 1959) 171 F.Supp. 665; *Sano Petroleum Corporation v. American Oil Company* (E.D.N.Y. 1960) 187 F.Supp. 345). The fact that somewhere down the line of their separate distributive chains purchasers of gasoline originating with Signal ultimately compete with purchasers of gasoline originating with Perkins does not establish competition at the secondary level.[42]

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41. It is clear that the Commission in *Ruberoid* meant by the phrase, "purchasers who are in fact competing with one another in the resale of the products in question," some prospect of "diversion of trade" between them (46 F.T.C., at 386).

42. The district court cases cited by petitioner (Br. 60-61) are not to the contrary. In *Guyott Company v. Texaco, Inc.* (D.Conn. 1966) 261 F.Supp. 942, 952, there was evidence that the favored

Petitioner argues that Perkins competed with Signal because each of them "purchased gasoline directly from Standard; each wholesaled that gasoline in the Pacific Northwest; and the retailers served by each actively competed" (Br. 59). This misstates the record because Signal did not sell to retailers in the Northwest, but sold to Western, which resold to a retailer, Regal. Nonetheless, it is apparently petitioner's theory that because all products eventually reach consumers, everyone who participates in their distribution or resale is in direct competition with each other—that is, every non-primary-line Robinson-Patman case is a secondary-line case. Manifestly, that is not what Congress intended.

The Act speaks separately of "competition with" the original seller, "competition with" the recipient of the favored price and "competition with" the customer of the recipient. Thus, Congress recognized the realities of the marketplace by focusing on specific competition at distinct levels in the chain of distribution. If it were otherwise, the elaborate definitional language in the Robinson-Patman amendment would have been superfluous, for Congress could simply have forbidden price discriminations whose effect may be "to injure, destroy or prevent competition with any person."

In this case, even if it could be shown (contrary to the fact) that the discrimination in favor of Signal was passed

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purchaser itself was in competition with customers of the disfavored purchaser (see *Trade Comm'n v. Morton Salt Co., supra*). In *Ingram v. Phillips Petroleum Company* (D.N.Mex. 1966) 259 F.Supp. 176, the court found that the disfavored purchaser would lose sales directly to the favored purchaser (259 F.Supp., at 183). Finally, despite the court's use of the term secondary-line, *McCormack v. Theo. Hamm Brewing Co.* (D.Minn.) 1968 Trade Cases par. 72,404, is in fact a third-line case.

on to Western, and by it to Regal, the competitive impact was limited to competition with Regal. Such competition, at the fourth distributive level, is not covered by the Robinson-Patman amendment to Section 2(b).[43]

B. ABSENT EVIDENCE TO THE CONTRARY, THE COURT BELOW CORRECTLY REFUSED TO TREAT THE SEPARATE CORPORATIONS OF WESTERN AND REGAL AS MERE TOOLS OF SIGNAL.

Petitioner argues that Signal, Western and Regal constituted a single favored purchaser because Western and Regal were "mere tools" of Signal (Br. 63). Petitioner concedes that the question whether one corporation controls another corporation in which it owns stock "is a factual one" (Br. 63).

Petitioner states (Br. 63):

> "* * * the record below contains evidence from which the jury properly could have inferred that Signal did, in fact, control Western Hyway and Regal to the extent necessary to accomplish Perkins' destruction."

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43. Petitioner says that the trial court submitted to the jury the question whether Perkins and Signal were competitors and that the jury could have found that they were (Br. 58-59). This is not correct. The trial court expressly charged the jury that Signal and Perkins were in fact competitors, which, of course, was not the submission of a question ~~of fact~~ for the jury's resolution (see instruction quoted at Br. 58, n. 39). This instruction was contrary to the record, and to respondent's contention throughout the trial (*e.g.*, Tr. 444; R. 1851).

Petitioner misstates the opinion of the court of appeals when he says that the court observed that "it was the diversion of sales (and profits) from the retail outlets served by Perkins to the Regal retail outlets served by Signal that 'adversely affected' Perkins' business" (Br. 61). If this were so, the case would involve third-line competition within the meaning of the Robinson-Patman Act. But it is not so. Signal sold only to the wholesaler Western; it made no sales to Regal or to any other retail outlet.

The court of appeals found (A. 110, n. 6):

> "In the case before us the record reveals no substantial evidence to show that Signal in fact dictated the corporate decisions of either Western or Regal. Absent such proof, Regal must be deemed a separate and autonomous entity."

Petitioner's own effort, at pages 63 to 65 of his brief, to find some support for his statement that "the jury properly could have found that Signal exercised its powers over its subsidiaries to the extent necessary to achieve the goal prohibited by the Clayton Act" (Br. 65), best demonstrates the lack of merit in his contention.

Petitioner says, first, that Signal could have controlled Regal's prices had it wanted to (a more than doubtful conclusion under the Sherman Act, *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U.S. 373; *Kiefer-Stewart Co. v. Seagram & Sons* (1951) 340 U.S. 211), but makes no contention that Signal in fact ever did control Regal's prices. He says next that some Signal officials were confused about the relationship between the Regal companies (Br. 64), a fact which, if true, would seem to indicate lack of interest in what Regal did, rather than the opposite.

Petitioner next says that the jury had before it "evidence" that a deteriorating price structure was in accord with Signal's objective, and "evidence" that Signal treated Western as its dependent transportation arm (Br. 65). He cites no record reference to support these assertions. In fact, there is no such evidence in the record.

Petitioner then refers generally to "manipulation and utilization of subsidiaries" to avoid the proscriptions of the Clayton Act, but states no fact that shows that any such "manipulation" or "utilization" occurred here (*ibid.*).

Finally, in place of proof, petitioner says that obtaining proof would have been an "insurmountable task" (Br. 65, n. 41).[44]

The truth of the matter is that the jury "found" nothing on this issue. At the trial, petitioner did not question that Signal, Western and Regal were separate and autonomous entities. He requested no instructions to the jury on this matter, and none was given. He did not even mention the matter in his argument to the jury (Tr. 6076-6209, 6296-6325A). So far as the jury was concerned, the issue never existed.

The court of appeals correctly held that the separate corporate identities of Signal, Western and Regal should not be disregarded merely because Signal owned 60 per cent of the stock of Western, and Western owned 55 per cent of the stock of Regal, in the absence of evidence that the subsidiaries' decisions were in fact controlled by the parent (A. 109-110, n. 6)—evidence which is lacking here.[45] Indeed, there was not even proof of a single common officer or director (cf. *Labor Board v. Deena Artware* (1960) 361 U.S. 398, 399-400, 402-404). Pejorative statements without foundation in the record, *e.g.*, "since Signal decided to do all that was necessary to drive Perkins out of business" (Br. 65-66) are not a substitute for proof.[46]

44. The task was not insurmountable. As petitioner acknowledges, Signal officials and Western's auditor were witnesses at the trial (Br. 10, n. 11, 64). Petitioner made no inquiries into inter corporate control.

45. Indeed, what evidence there is shows that Western acted quite independently of Signal. In 1955, to Signal's considerable chagrin, Western began to purchase gasoline from suppliers other than Signal and by 1957 bought more than 50 per cent of its total volume from other suppliers, thus depriving Signal of its wholesale profits (see p. 11, *supra*).

46. In response to petitioner's motion for clarification of the opinion of the court of appeals, respondent noted that petitioner, on retrial, is free to litigate the issue of fact whether Signal dictated the corporate decisions of either Western or Regal.

V. This Court should not reinstate the jury verdict. Numerous material errors of the trial court, some recognized by the court of appeals and others referred to but not passed upon by that court, require a new trial.

A reversal of the decision of the court of appeals on the question of law concerning the competitive effects provisions of Section 2(a) would not warrant reinstatement of the verdict. On appeal, Standard specified numerous material errors of the trial court.[47] The court of appeals decided a number of these against Perkins. As to others, the court expressed confidence that they would not occur at another trial, but added the admonition that its failure to pass upon them "is not to be taken as appellate approval" (A. 117). Since petitioner asks for reinstatement of the verdict, we advert here to issues other than those discussed above which would make such disposition of the case inappropriate. We recognize that resolution of these issues would require a review of this voluminous record—a task which appropriately lies in the first instance with the court of appeals (see *F.T.C. v. Anheuser-Busch, Inc.* (1960) 363 U.S. 536, 542, 553; *Utah Pie Co. v. Continental Baking* (1967) 386 U.S. 685, 704). We raise them here simply to demonstrate their substance.

A. ERRORS WITH RESPECT TO BRANDED DEALERS.

(1) PRICE ASSISTANCE GRANTED BRANDED DEALERS DURING PRICE WARS DID NOT RESULT IN DISCRIMINATION.[48]

As noted above, Standard normally sold to its dealers at the posted tank truck price, while Perkins had a jobber's discount of from 4 to 5½ cents per gallon off that price

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47. For the convenience of the Court, we have lodged with the Clerk a copy of our "Specification of Errors" required by and filed with the court of appeals. That document is referred to as "Spec. Errors."

48. Spec. Errors, pp. 70-96.

pp. 16-17, *supra*). Standard extended price assistance to its dealers (an allowance off posted price) during price wars (Exhs. 1453A, 1453B). Standard contended that the price to its dealers, for the purpose of determining discrimination, was what they actually paid, i.e., the tank truck price less any price assistance allowance; that the law did not require Standard always to maintain Perkins' price advantage over Standard's dealers; that price discrimination would occur only if the dealers' actual price was lower than the price paid by Perkins. This clearly is the law.[49]

The trial court refused Standard's instruction to this effect (A. 85-86; A. 457) and, over Standard's objection, its instructions permitted the jury to award damages to Perkins because of Standard's price assistance policy, even though the prices to dealers were higher than those paid by Perkins (A. 65-67, 473-474).[50]

Standard's motion for directed verdict and peremptory instructions on this issue were also erroneously denied.

There is no question as to the facts. Standard's price records (Exh. 81A-XX) show that Perkins always enjoyed a lower price than Standard's dealers except for the one-cent differential as to one grade of gasoline during one week in one price zone in the town of Centralia, Washington.

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49. *Jarrett v. Pittsburgh Plate Glass Co.* (5 Cir. 1942) 131 F.2d 674; see *A. J. Goodman & Son v. United Lacquer Mfg. Corp.* (D. Mass. 1949) 81 F.Supp. 890. This accords with the definition of "price" as used in the statute (see *The Firestone Tire & Rubber Co.* (1959) 55 F.T.C. 1759, 1764; *Morton Salt Co.* (1948) 45 F.T.C. 328, 329; *United States Rubber Co., Et Al.* (1939) 28 F.T.C. 1489, 1504); it further reflects the fact that the repeated attempts to make functional discounts compulsory have always been rejected (S. 315, 86th Cong., 1st Sess.; H.R. 3465, 87 Cong., 1st Sess.; H.R. 2170, 88th Cong., 1st Sess.).

50. In appraising the effect of the instruction given, it should be noted that the term "subsidy" was used frequently throughout the trial as synonymous with "retail price assistance" (*e.g.*, A. 196-197, Tr. 4424, 4690, 5039).

(2) PETITIONER'S WHOLESALE DISTRIBUTION CONSTITUTED PRACTICALLY ALL OF HIS BUSINESS. AS A WHOLESALER HE WAS NOT ENTITLED TO PROMOTIONAL PAYMENTS OR SERVICES.[51]

Practically all of Perkins' business was wholesale distribution. The trial court submitted to the jury Perkins' claim that Standard violated Sections 2(d) and 2(e) of the Clayton Act by extending to branded dealers promotional payments and services not made available to Perkins (A. 66-67). The court of appeals sustained Standard's contention that this was error (A. 103-104, 111-112; A. 457-458, e.g., A. 82-83,89; R. 1786, 1787, 1829), since Perkins, to the extent he operated as a wholesaler, was not entitled to services and promotional payments on proportionally equal terms with Standard's branded dealers. This ruling is in accord with this Court's decision in *FTC v. Fred Meyer, Inc.* (1968) 390 U.S. 341, 357. The evidence discloses only one retail operation by Perkins—a service station in Vancouver, Washington (A. 487; Tr. 1241-1242, 4896). Yet, the trial court's instructions permitted the jury to award damages under Sections 2(d) and 2(e) measured by Perkins' entire wholesale gallonage (A. 65-67).

There is an additional issue concerning Sections 2(d) and 2(e) not discussed by the court of appeals. Standard did not extend retail price assistance to any branded dealer in Vancouver (A. 391). At the same time, Perkins' retail station enjoyed a jobber's price advantage of 4 to 5½ cents (A. 591). Perkins was not entitled to this price advantage over Standard's dealers and, in addition, to the restroom maintenance allowance and credit card service. Even if he were so entitled, he was not injured because of his much lower gasoline cost.

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51. Spec. Errors, pp. 70-71, 91, 97.

(3) THERE WAS NO EVIDENCE OF INJURY TO PETITIONER RESULTING FROM STANDARD'S TREATMENT OF ITS BRANDED DEALERS.[52]

The court of appeals did not discuss Standard's assignments of error relating to the standards of proof necessary to show injury proximately caused by reason of alleged discriminations. Proof of injury by reason of advantages extended by Standard to its dealers and denied Perkins requires a showing of diversion of trade from petitioner to the favored dealers or a diminution of petitioner's profits resulting from the lowering of his resale prices to avoid such diversion of trade (*Enterprise Industries v. Texas Company* (2 Cir. 1957) 240 F.2d 457, certiorari denied (1957) 353 U.S. 965; *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.* (2 Cir. 1949) 178 F.2d 150; *Youngson v. Tidewater Oil Company* (D.Or. 1958) 166 F.Supp. 146, 147; *Alexander v. Texas Company* (W.D.La. 1957) 149 F. Supp. 37, 41). There is no evidence that Standard's branded dealers diverted trade from petitioner or any outlet supplied by him. Nor is there any evidence that petitioner was compelled to lower a price to keep customers from dealing with Standard dealers.

B. ERRORS GOING TO THE DAMAGE COMPUTATIONS.

(1) ERROR IN ADMISSION OF AND INSTRUCTIONS ON DIFFERENTIAL CHART.[53]

Petitioner's Exhibit 82B (A. 503), entitled "Price Differential on Gallons Sold," was a schedule purporting to show the total differential between prices paid for gasoline by Perkins and by Signal—$128,420. It was computed as follows: Petitioner took a figure (.6877 cents), which he claimed to be the "average differential" between the prices paid by Perkins and the prices paid by Signal at Portland

52. Spec. Errors, pp. 72-73, 104-107.
53. Spec. Errors, pp. 188-220.

during the period July 1, 1956, to November 1, 1957 (Exhs. 82C-82D, A. 529-530), and multiplied it by the entire gallonage of gasoline delivered by Standard to Perkins throughout the entire Northwest *during the period from March 6, 1955, to November 30, 1957.*[54] This faulty schedule went to the jury with the instruction that "In determining the amount of damage, if any * * * suffered by [Perkins]" the jury could consider "the amount of price differential on gasoline * * *" (A. 65-66). Clearly the admission of the faulty schedule and the instruction were material error, as is clearly demonstrated in petitioner's argument to the jury (*e.g.* Tr. 6090, 6152, 6316-6317, 6324).

Further, the price was fictitious. It was a computed price for gasoline destined for resale in Portland and improperly eliminated a .33 to .36 cent freight allowance (Exh. 82-C-82-D, A. 529-530, Tr. 3594-3596). But even if the figure be accepted, Perkins' isolated sales in Portland were a "drop in the bucket" when compared with Perkins' total sales (Tr. 3634; see p. 16, *supra*).

(2) ERRORS IN DAMAGE COMPUTATIONS REFLECTING DECLINES OF OVERALL SALES.

(a) *Loss of profits on gasoline sales.*[55]

Petitioner's Exhibits 82-E (A. 531) and 82-F (A. 533) presented to the jury a damage claim of $168,251 for alleged loss of gross profits on gasoline sales from March, 1955, to December 1957.[56] The exhibits compared "adjusted" actual

54. Actually Signal did not begin lifting in Portland until August 27, 1956 (A. 203; Tr. 4318; Exhs. 1550A-1 through A-4), and the first Regal station, the alleged source of injury, did not open until September of that year (Exh. 1683).

55. Spec. Errors, pp. 220-240 (see also p. 16, note 17, *supra*)

56. The assumed gross profit of two cents per gallon used in Exhibit 82-E (A. 531) consisted of Perkins' actual average gross profit during 1955 through 1957, to which the accountant added the "average price differential" discussed above (p. 48), which was computed for a period of less than half the three years to which it was applied (Tr. 3654-3660).

sales[57] with an ideal gallonage which was computed on the assumption that sales of gasoline by Perkins during 1955, 1956 and 1957 would have increased ten per cent per year but for the alleged discriminations. The court of appeals held this assumption to be without foundation and to be unwarranted (A. 115).[58]

(b) *Loss of sales generally.*[59]

Petitioner's Exhibit 82-G-2 (A. 534) is a schedule which presented to the jury a damage claim of $10,771 for loss of gross profits due to a decline in the sale of fuel oils. Exhibit 82-0 (A. 539) stated a claim of $155,700 for loss in the goodwill value of the Perkins' fuel oil business based on the decline of fuel oil sales. Exhibits 82-J, 82-L and 82-M (A. 535-537) made claims for $136,441, $29,915 and $5,190, respectively, for losses in the going concern value of Perkins' reversionary interests in service stations leased to others. The premise underlying all of these exhibits was that every single loss of sales (computed and actual) by Perkins, from early 1955 through November 1957, was

57. The adjustment was totally without evidentiary support. It was arrived at by excluding from actual sales all sales through outlets which the accountant claimed required capital expenditures (Tr. 3640-3641, 3663-3665). There was no evidence that growth in sales can be reasonably expected without some capital outlay, or that the specific outlets excluded required any capital outlay.

58. The only support claimed for this assumption (Tr. 3642-3643) was the provision in Standard's supply contracts (Exh. 2, A. 493, 102, A. 549) obligating Standard to increase the maximum amounts deliverable by ten per cent a year in the event Perkins required such additional liftings. The only evidence on market trends are the Oregon Motor Vehicle Fuel Tax reports (Exh. 21-A). They show that, in Oregon, industry sales decreased in 1957 below those of 1956. They also show a growth of industry sales from 1954 to 1956 of less than five per cent per year and a decline in Standard's share of total industry sales during those years.

59. Spec. Errors, pp. 240-298, 319-322.

caused by Standard's discriminations. Yet, even assuming that the price wars said to have been begun by Regal spread from Portland and ultimately affected the entire market of Perkins, the first Regal station did not open until September of 1956. Thus, even if Perkins had proved the isolated claim of injury in Centralia in 1955, which is unrelated to Regal (see p. 18, *supra*), that incident in that small area is no support for a finding that Standard caused every decline of sales in every product sold by Perkins from Olympia, Washington, south to the California border during the year and a half before Regal opened.

Further, petitioner was permitted to include in its damage schedules losses of sales which clearly were shown to have been sustained for reasons entirely unrelated to any issue in this case.[60]

(c) *Loss of fuel oil sales.*[61]

Allen Perkins testified that customers who quit buying gasoline also quit buying fuel oils (A. 370-371). On this generalization the trial court admitted petitioner's Exhibit 82G-2 (A. 534) and Exhibit 82-0 (A. 539) which were schedules showing a decline in the gross profits and goodwill value of Perkins' fuel oil business in the amount of $166,471.

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60. Thus the decline in sales of a Perkins' dealer in Centralia was proved to be due to the freeway's bypassing his station (Exhs. 1419-B, 1419-F; A. 242); another customer was lost because his former supplier, with whom he was still under contract, enforced his contract by court action (Exhs. 1328-A through 1328-D, 1329); the Perkins of Oregon corporation closed a station in Portland for unexplained reasons months before the advent of Regal; other customers were lost to Standard's competitors—Time Oil Co. (A. 137; Tr. 3041; Richfield (Tr. 5608-5610); and Shell (Tr. 3452). The damage schedules attributed all of these losses to Standard's alleged discriminations.

61. Spec. Errors, pp. 240-254, 283-290.

Quite apart from its lack of evidentiary value, the testimony was incorrect.[62]

(d) *Losses to Perkins individually.*[63]

Exhibits 82J (A. 535), and L (536), claiming \$136,441 and \$29,915 for loss suffered by Perkins as an individual in the goodwill value of his reversionary interest in service stations, were erroneously admitted for the further reasons, as held by the court of appeals, that their captions were misleading and they included business other than that done at service stations (A. 115). Further, Perkins did not realize a loss in his proprietory or reversionary interest in his retail stations. When he terminated the supply arrangement with Standard, he leased his service stations to Westway, a subsidiary of Union Oil Company (Exh. 1003). Westway's rental depended largely on the gallonage which Westway would thereafter sell through the stations (Tr. 1597; Exhs. 1003, 1607(A)-(H), and not at all on how much Standard gasoline had been sold through the stations earlier. Consequently, even if a loss in the goodwill value of Perkins' interest in the service stations did occur prior to 1957 because of a decline in gallonage, the loss did not materialize because Perkins did not dispose of his interest in the stations (*Volasco Products Company v. Lloyd A. Fry Roofing Company* (6 Cir. 1962) 308 F.2d 383, 393, certiorari denied (1963) 372 U.S. 907). Actually, Perkins as an individual received higher rentals from Westway than he received from the Perkins corporations (Exhs. 1084-1087, A. 578-584).

62. The Washington corporation's company-operated retail station near Vancouver averaged 34,136 gallons of gasoline per month during the 18 months before Regal opened and 32,182 gallons per month during the remaining 14 months; it averaged 16,101 gallons of diesel oil pre-Regal, and 27,728 gallons per month after Regal (Exh. 284B, A. 563).

63. Spec. Errors, pp. 257-269.

C. ERRORS RELATING TO STANDARD'S MEETING COMPETITION DEFENSE.[64]

Relying on the "good faith meeting competition" defense of Section 2(b), Standard offered to show that in making the adjustments to Signal which gave it the slight price advantage over Perkins, it did so to meet the lower prices of a competitor. An officer of Standard testified that before Standard lowered its price to Signal he was informed by that company that Union had made it a lower offer and that the reduction to Signal was made to retain its business (A. 428, 432-433; Exh. 1705, A. 651) Thereafter, Standard offered and the court excluded Union's business records (Exhs. 1694, 1695, 1696, 1698, 1699, 1702, 1708, 1713 and 1714, A. 635-642, 644-645, 648, 654 and 658-660) showing sales by Union to Signal at prices below those offered by Standard (Tr. 5201, 5539-5541). The documents were offered to corrobrate the prior notice by Signal to Standard and as direct evidence of Union's prices. The ruling by the court of appeals that the exclusion of that corrobrative evidence was erroneous is clearly correct, particularly in view of the trial court's instruction (A. 64):

> "* * * *there must have been a definite offer* which was extended by a competitor of defendant Standard to a customer of defendant and defendant must have been aware of such offer and must have acted in good faith in meeting such competitive offer" (emphasis added).

Moreover, the instruction itself was incorrect, as the court of appeals recognized (A. 116-117). Under settled law, respondent was not required to prove a definite offer but rather only a reasonable belief that a lower competitive offer had been made (see, *e.g., Trade Comm'n. v. Staley Co.* (1945) 324 U.S. 746, 759-760).

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64. Spec. Errors, pp. 442-456.

The error was not cured by the fact that the trial court also gave Standard's requested instruction, correctly stating the law. A jury is not permitted to choose between inconsistent instructions, where one is erroneous. In such a situation prejudice will be presumed (see, *e.g.*, *Bollenbach v. United States* (1946) 326 U.S. 607, 611-612; *Pacific Greyhound Lines v. Zane* (9 Cir. 1947) 160 F.2d 731). That rule is particularly applicable here, where counsel contributed to the prejudice by arguing to the jury:

> "[T]he burden is upon them in this particular issue. They must show you that *they were in fact* meeting a bonafide [sic] competitive offer extended to Signal Oil and Gas as a justification" (Tr. 6188) (emphasis added).[65]

CONCLUSION

For the reasons stated, the judgment of the court of appeals, which directed a new trial, should be affirmed.

Respectfully submitted.

Francis R. Kirkham
Richard J. MacLaury
Attorneys for Respondent

H. Helmut Loring
Pillsbury, Madison & Sutro
McColloch, Dezendorf & Spears
Of Counsel

April, 1969.

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65. Petitioner argues at Br. 66-68 that no reversible error was committed with respect to Standard's good faith meeting competition defense discussed above. He did not, however, preserve this point for review here in his petition for a writ of certiorari, either in the questions presented (Pet. 2-3) or in his footnote reservation with regard to certain damage issues (Pet. 13, n. 7).

Appendix

Record citations for exhibits referred to in this brief are as follows:

(References are to the trial transcript. Exhibits not identified in the transcript were identified in the pretrial order (R. 1264-1386))

Plaintiff's Exhibits

Exhibit No.	Identified	Offered	Received
2	p. 2142-3	1307	1307
4A	1407-8	1408	1408
4B	290-1	291	291
21A	2464-5, 3545	2464-5, 3545	2485, 3546
23H	1454-5	1455	1455
24BBB) 24CCC)	2050-2051	2052	2052
81A through XX	2008-10	2009	2012
82B	3627-8	3631	3639
82C	3592	3593	3623
82D	3591	3593	3623
82E	3639-40	3650	3819
82F	3639-40	3650	3819
82G-2	3684-5	3685	3695
82J	3713-6	3716	3729
82L	3740-1	3741	3744
82M	3746	3747	3749
82-O	3783-4	3786	3790-1
93I		3013, 3020 3418	3418
93M	2983-4	3416, 2988	3417, 3011
93N		3416	3417
102		1249	1249
106C			2221
106D	2221		2221-2
106E	2222		2222-3
235	2627-8, 3636, 3637, 3639-40, 2633	2640	2642
284A) 284B)	3075	3075	3077
354B through Y		6046	6046
403) 422 through) 428		159	159

Defendant's Exhibits

Exhibit No.	Identified	Offered	Received
1003		1593	1594
1007	1925	1975	1976
1084 through 1087	3440		3440
			3440
		3442	3442
1311 (A) through 1311 (E)		812-14	814
1328A-D		5616	5617
1329		5616	5617
1415			
1416	1985	1986	1986
1419 (B)	5617		5618
1419 (F)			
	1656		
	1648		
1448	4115-16	4159	4177-8
1449	4276	4276	4282
1450 (B) through 1450 (Z)	4218	4218-19	4219
1451	4670-77	4677	4677
1453 (A)	4522	4522	4522
1453 (B)			
1453 (R)		637	638
1456 (A)	4715	4720	4721
1457 (A)	4682-9	4689	4696
1458 (A)	4747	4755	4755
1458 (D)			5619
1463	4697-4701	4703	4704
1467	4856-7	5143	5144
1477	4896-7	5143	5144
1478	4901-2	5143	5144
1479	5031-2	5143	5144
1480	5047-8	5143	5144
1481	5055-6	5143	5144
1482	5058-9	5143	5144
1483	5060-61	5143	5144
1485	5067-8	5143	5144
1488	5081-2	5143	5144
1489	5084	5143	5144
1490	5085-6	5143	5144
1491	5092-3	5143	5144
1493	5106-7	5143	5144
1494	5113-14	5143	5144

Defendant's Exhibits (Continued)

Exhibit No.	Identified	Offered	Received
1495	5120-1	5143	5144
1497	5123-4	5143	5144
1500	5140-1	5143	5144
1504 (A)		1663	1663
1511 (A)	4696	4696	4696
1511 (B)			
1523 (A) (CC)	4534	4542	4543
through	4543-5	4542	4542
		4545	4546
1550	4319	4321	4361
1550 (A) (1) through	4313-15	4317	4317-4318
1550 (A) (4)			
1550 (B)	5492	5493	5496
1550 (B) (1)	5493	5493	5496
1607 (A) through		1594	1595
1607 (G)			
1607 (H)		1594	1595
1683	4554-5	4555	4556
	5026-9	5030	5030
1694		5168, 5538, 5664	Rej. 5540, 5665
1695		5538, 5664	Rej. 5550, 5665
1696		5538, 5664	Rej. 5540, 5665
1697			Rej. 6057
1698		5538, 5664	Rej. 5540, 5665
1699)			
1700)			Rej. 6057
1701)			
1702		5538, 5664	Rej. 5540, 5665
1703			5217
1705	5474	5475	5475
1708		5539, 5664	Rej. 5539, 5665
1710	5529	5530	5530
1711	5525-6	5526	5526
1713		5538, 5664	Rej. 5540, 5665
1714		5538, 5664	Rej. 5540, 5665